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Public Prosecutor v Soha Beta & Anor

B HIGH COURT (MIRI) — CRIMINAL TRIAL NO MYY-45B-2/7 OF 2014
MAIRIN IDANG JC
23 NOVEMBER 2016

C *Criminal Law — Murder — Cause of death — Both accused charged with murder under ss 302 and 34 of the Penal Code — Whether baby died before he was buried by accused — Whether prosecution made out prima facie case against both accused — Criminal Procedure Code s 180(1) — Penal Code ss 34 & 302*

D Both the accused persons were charged for an offence of murder under s 302 of the Penal Code ('the Code') read together with s 34 of the same for intentionally causing the death of their own biological baby by burying him alive. The doctor who did the post-mortem ('PW19') found that the cause of death of the baby was asphyxia. The prosecution in the submission stated that the baby had died due to asphyxia and that it was the accused who had killed the baby by burying it alive. However, both accused in their defence had submitted the baby was already dead when it was buried.

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F **Held,** discharging and acquitting the accused on the charge of murder under s 302 of the Code:

(1) The prosecution had not proven ingredient that both accused person in furtherance of their common intention had asphyxiated their own new born baby by burying him alive. The baby was already dead when he was brought by the two persons to be buried at the burial site. According to PW19 if the baby was buried alive, he surely would be struggling for air, there would therefore be traces of soil in the baby's nostrils and mouth. The court could not accept the security guard's ('PW13') evidence on hearing the baby cries which he heard ten minutes later after the two persons had allegedly left the burial site, and it was impossible for the baby to cry out after ten minutes of being buried. The investigation officer's evidence on the baby cries allegedly heard by PW13 where he said, 'There is lots of possibility if God willing to show it may happen', did not help the prosecution's case, because to accede to such evidence would go against the scientific explanation of PW19 who had done 1000 or more post-mortem which have been accepted by the court. The court relied on PW19's evidence which supports courts finding that the baby was in fact already dead when the two persons took the baby for burial at the burial site (see paras 10 & 21–24).

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(2) Based on the court's analysis and maximum evaluation of the evidence and submissions of both the accused and the prosecution, there existed reasonable doubt in the prosecution's case. A prima facie case had not been established warranting to call upon the accused to enter their defence (see para 25).

[Bahasa Malaysia summary

Kedua-dua tertuduh dituduh bagi kesalahan membunuh di bawah s 302 Kanun Keseksaan ('Kanun') dibaca bersama dengan s 34 Kanun yang sama kerana secara sengaja menyebabkan kematian bayi biologi mereka sendiri dengan mengebumikannya hidup-hidup. Doktor yang membuat autopsi ('PW19') mendapati bahawa sebab kematian bayi adalah asfiksia. Pihak pendakwaan dalam berhujah menyatakan bahawa bayi meninggal dunia akibat asfiksia dan bahawa ia adalah tertuduh yang membunuh bayi dengan mengebumikannya hidup-hidup. Walau bagaimanapun, kedua-dua tertuduh dalam pembelaan mereka telah berhujah bayi telah meninggal dunia apabila ia dikebumikan.

Diputuskan, melepaskan dan membebaskan tertuduh atas tuduhan membunuh di bawah s 302 Kanun:

(1) Pihak pendakwaan tidak membuktikan perkara bahawa kedua-dua tertuduh dalam melanjutkan niat bersama mereka telah melemaskan bayi baru lahir mereka sendiri dengan mengebumikannya hidup-hidup. Bayi telah meninggal dunia apabila ia dibawa oleh kedua-dua orang tersebut untuk dikebumikan di tapak perkuburan. Mengikut PW19 jika bayi ditanam hidup-hidup, ia semestinya bergelut untuk udara, oleh itu akan terdapat kesan tanah di dalam hidung dan mulut bayi. Mahkamah tidak dapat menerima keterangan pengawal keselamatan ('PW13') yang mendengar bayi menangis selepas kedua-dua orang tersebut meninggalkan tanah perkuburan tersebut, dan adalah tidak mungkin bagi bayi untuk menangis selepas sepuluh minit ditanam. Keterangan pegawai penyiasat mengenai bayi menangis yang didakwa didengar oleh PW13 di mana dia berkata, 'There is lots of possibility if God willing to show it may happen', tidak membantu kes pihak pendakwaan, kerana untuk bersetuju kepada keterangan sedemikian akan menentang penjelasan saintifik PW19 yang telah melakukan 1000 autopsi atau lebih yang mana telah diterima oleh mahkamah. Mahkamah bergantung ke atas keterangan PW19 yang menyokong dapatan mahkamah bahawa bayi sebenarnya telah meninggal dunia apabila kedua-dua tertuduh mengambil bayi untuk dikebumikan di tanah perkuburan (lihat perenggan 10 & 21–24).

(2) Berdasarkan analisa mahkamah dan penilaian maksimum terhadap keterangan dan penghujahan kedua-dua tertuduh dan pihak pendakwaan, wujud keraguan munasabah di dalam kes pihak

pendakwaan. Kes prima facie tidak dibuktikan mewajarkan untuk memanggil tertuduh bagi memasukkan pembelaan mereka (lihat perenggan 25).]

Notes

For a case on cause of death, see 4(2) *Mallal's Digest* (5th Ed, 2015) para 1743.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85; [2004] 1 LNS 517; [2005] 1 AMR, 323, FC (refd)
Chan Chwen Kong v PP [1962] 1 MLJ 307; [1962] 1 LNS 22, CA (refd)
Chang Kim Siong v PP [1968] 1 MLJ 36; [1967] 1 LNS 18, FC (refd)
Jayaraman & Ors v PP [1982] 2 MLJ 306; [1982] CLJ 464; [1982] CLJ Rep 130, FC (refd)
Karam Singh v PP [1967] 2 MLJ 25; [1967] 1 LNS 65, FC (refd)
PPv Magendran a/l Mohan [2005] 6 MLJ 6; [2005] 3 CLJ 592, HC (refd)
PPv Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
Sunny Ang v PP [1966] 2 MLJ 195; [1965] 1 LNS 171, FC (refd)

Legislation referred to

Criminal Procedure Code s 180(1)
Penal Code ss 34, 302, 318

Musli Ab Hamid (Deputy Public Prosecutor, Attorney General's Chambers) for the complainant.
Ranbir Singh (Ranbir S Sangha & Co Advocates) for the accused.

Mairin Idang JC:

[1] Both accused persons were charged for an offence of murder under s 302 of the Penal Code read with s 34 of the same Code for intentionally causing the death of their own biological baby by burying him alive on the 26 November 2013 at about 3.30pm at Lereng Bukit Jalan Ladang Alamwasa Sdn Bhd, Suai, Batu Niah, in the district of Miri in the State of Sarawak.

[2] The charge reads as follows:

> Bahawa kamu pada 26.11.2013, jam lebih kurang 3.30 petang, bertempat di Lereng Bukit, Jalan Ladang Alamwasa Sdn Bhd, Suai, Batu Niah, di dalam Daerah Miri, di dalam Negeri Sarawak, bagi mencapai niat bersama kamu telah membunuh seorang bayi lelaki (tiada nama), dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun yang sama.

[3] The ingredients of the offence which the prosecution needs to prove are as follows: A

(a) the baby of the first and second accused had died;

(b) the baby of the first and second accused had died due to asphyxia; and B

(c) both the first and second accused persons in furtherance of their common intention had asphyxiated their own new born baby by burying him alive on 26 November 2013 at Ladang Alamwasa with the intention to kill him.

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[4] Section 180(1) of the Criminal Procedure Code provides that when the case for the prosecution is concluded the court shall consider whether the prosecution has made out a prima facie case against the accused. Section 180(1) provides as follows:

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(1) When the case for the prosecution in concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused.

(2) If the court finds that a *prima facie* case has not been made out against the accused, the court shall record an order of acquittal. E

(3) If the court finds that a *prima facie* case has been made out against the accused on the offence charged the court shall call upon the accused to enter on his defence.

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[5] The steps to be observed by the trial court at the close of the prosecution case have been summarised in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 (Federal Court decision).

[6] What then constitutes a prima facie case? The Federal Court in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85; [2004] 1 LNS 517; [2005] 1 AMR 323 described 'a prima facie case' in the following terms: G

> A prima facie case is one that is sufficient for the accused to answer, and the evidence adduced must be such that it can only be surmounted by the evidence in rebuttal. H The force of that evidence must, if unrebutted, be sufficient to induce a state of belief that the facts as they stand are as stated in the charge. In order to make a finding the court must, at the close of the prosecution's case, undertake a positive evaluation of the credibility and reliability of all the evidence adduced to determine whether all the elements of the offence have been established. If the evidence is I unrebutted, and the accused remains silent, he must be convicted. Therefore, the test to be applied at the end of the prosecution's case is whether there is sufficient evidence to convict the accused if he chooses to remain in silent, which if answered in the affirmative means that a prima facie case has been made out. This requires a consideration of the existence of any reasonable doubt in the prosecution's case,

which if it exists, cannot lead to the finding of a prima facie case having been made out.

[7] It is clear that the court must subject the prosecution evidence to maximum evaluation to determine whether all the essential ingredients have been proven. A maximum evaluation requires the court to test, scrutinise and evaluate the prosecution evidence thoroughly from all angles. It is a test of credibility and reliability of the prosecution evidence.

BRIEF FACTS

[8] The first accused ('A1') and the second accused ('A2') were both working with Sarawak oil palm plantation. A1 is the brother-in-law of A2. A1 is married to A2's elder sister. A1 and A2 had an affair and A2 gave birth to a baby boy ('the baby') on the 23 November 2013 around 5.05pm at the Miri Hospital ('the hospital'). Marilyn Sahek ('PW15') a nurse at the Miri Hospital assisted A2 in giving birth. Dr Rizal bin Firdaus ('PW14') who attended to A2 postnatal, confirmed the baby did not suffer from any diseases. On the 24 November 2013, A2 was discharged from the said hospital together with the baby. On the 26 November 2013, one Titus Farneubun ('PW13') discovered the baby being buried at Lereng Bukit, Jalan Ladang Alamwasa Sdn Bhd, Suai Batu Niah. Dr Jamil bin Dolkadir ('PW19') did the post-mortem and his finding on the cause of death of the baby was asphyxia. Both A1 and A2 were arrested on 2 December 2013 around the area of Rumah Minggu between Bintulu and Bakun. They were subsequently charged under s 302 of the Penal Code read with s 34 of the same Code.

[9] The prosecution had called 20 witnesses. It is the submission of the prosecution that the baby had died due to asphyxia and that it was A1 and A2 who had killed the baby by burying it alive on the 26 November 2013 at Ladang Alamwasa. The defence counsel amongst others, had submitted the baby was already dead when it was buried.

[10] I have read the evidence adduced by the prosecution, I find that the prosecution had not proven ingredient *'3. Both the first and second accused person in furtherance of their common intention had asphyxiated their own new born baby by burying him alive on the 26 November 2013 at Ladang Alamwasa with the intention to kill him'*. (Emphasis added.)

[11] I find that the baby was already dead due to asphyxia before he was buried at Ladang Alamwasa on the 26 November 2013. I made my finding after reading all the prosecution's evidence and in particular the evidence of PW13, PW18 and PW19.

PW13 EVIDENCE

[12] PW13 is the security guard employed by Alamwasa Plantation Sdn Bhd. On the 26 November 2013 he was on duty and was at the security house. He said around 3.30pm while standing in front of the security house facing the road he saw a male and female persons approaching towards his direction from the main road ('the two persons'). He said these two persons stopped at the pond, then they had turned right and went into the bushes (Lereng Bukit). He said he saw the female person as if carrying a baby in a cloth pouch which was tied around her neck. He said he could clearly see the male face but not the female. He also said after the two persons turned right he could no longer see them. It was only after ten minutes that he saw the two persons coming out and walking towards the main road (QA5558 p 214 NOP). He said the female person was no longer carrying anything (QA5562 p 214 NOP). Then he heard a baby crying (QA5580 p 215 NOP). He said the baby's cries were clear (QA5583 p 215 NOP). He again heard the baby cries for the second time (QA5592 p 215 NOP). He said the cries were not loud but the cries were for quite sometimes (QA5597 p 215 NOP).

[13] PW13 after hearing the baby cries went straight to where the cries came from. He said he saw a 'patch of earth that had recently being dug up and covered with a white fertilizer plastic bag' ('the burial site'). He said he could not hear any baby cries at this burial site (QA5617 p 216 NOP). He then tried to push the soil aside with his foot but he did not see anything so he went back to the security house to take a hoe. On coming back to the burial site, he used the hoe to remove the soil then he saw a baby's leg sticking out from the ground. He said the body and the face of the baby was completely covered by the soil (QA5992 p 260 NOP). He called his manager who then informed the police.

[14] In cross-examination PW13 said the distance from the guard house to where the two persons were coming from was about 100 meters (QA6018 p 232 NOP). He also confirmed that when he heard the baby's cries the two persons were already on the road going to the main road (QA5944 p 258 NOP).

[15] In re-examination PW13 said the accused and the one female were about 10–20 minutes in the bushes (QA6205 p 268 NOP).

[16] I also asked PW13 how long were the female and male persons in the area and his reply was two hours until they left the place (QA6250 p 270 NOP). When I asked PW13 on when he had heard the baby cries, his reply was when the two persons had left the bushes (QA6255 p 270 NOP).

PW18 EVIDENCE

[17] ASP Soliment Nyian ('PW18') was the investigation officer ('IO') of this case. He had given a witness statement ('WSP18'). PW18 said when the body was dug from the burial ground the body was wrapped with a light green cloth which was again wrapped with a white cloth. He said the two clothes were printed with 'untuk kegunaan hospital sahaja' (para 8 of WSP18). PW18 testified that the distance between the guard house where PW13 was standing and the burial site was about 74 meters (QA7178 p 322 NOP). He also said from his investigation namely from PW13 the baby was crying from underground which was heard by PW13 (QA7184 p 322 NOP). When told this was impossible, his reply was: 'There is lots of possibility if God willing to show it may happen.' (QA7189 p 323 NOP).

PW19 EVIDENCE

[18] Dr Jamil bin Dolkadir ('PW19') was the pathologist. He carried out the post-mortem of the baby on the 11 November 2013 at the Miri Hospital. He had prepared the post-mortem report (P45). His finding on the cause of death of the baby was asphyxia. He said when the baby was buried underneath the soil, the chance of survival was nil (QA7555 p 336 NOP). He also said he did not find anything in the mouth of the baby (QA7565 p 336 NOP). He also said a baby buried underneath the soil can cause asphyxia (QA7569 p 336 NOP).

[19] PW19 explained asphyxia as lack of oxygen in the blood due to suffocation or strangulation (QA7607 p 338 NOP). He said the baby was not strangulated (QA7611 p 338 NOP). He also agreed asphyxia or suffocation could be done by placing a hand over the nose and mouth of the baby to prevent from breathing (QA7614 p 338 NOP). He also said asphyxia could also be caused by burying the baby alive (QA 7620 p 338 NOP). It was put to PW19: 'If the baby was buried alive while the soil covered its face, nose and mouth, the baby would be struggling to breathe through its nose and mouth, is that correct?'. His answer was yes. But PW19 also said the baby was only three days old it may not be able to struggle much (QA7624 p 338 NOP). When PW19 was asked: 'If the baby was covered with soil and was trying to breath would it be likely for there to be some soil in its nostrils and mouth?'. His answer was yes (QA7633 p 339 NOP). PW19 also said he did not find any soil in its nostrils and mouth (QA7638 p 339 NOP). When asked: 'This would indicate that the baby was asphyxiated before it was buried?'. He answered: 'Yes. The nostrils and the mouth can be cleaned if the baby whole body was wrapped in the cloth before it was buried then the nose and mouth will be clean.' (QA7642 p 339 NOP). PW19 was also asked: 'Whether the baby face, nose and mouth was covered with soil or by a cloth while it was buried, the

baby still would not be able to cry, do you agree?'. His answer 'Yes I agree' (QA7657 p 339 and QA7660 p 340 NOP). But PW19 was not able to form an opinion whether the baby was likely asphyxiated before it was buried or after it was buried (QA 7662 p 340 NOP).

[20] In re-examination PW19 when asked: 'If the baby was buried alive underneath the soil while he was struggling to breathe was there any possibility that the baby would cry for breath?'. His answer: Yes (QA7672 p 340 NOP). When it was suggested: 'In that case, there was no certainty based on the contention of the defence counsel that after the baby was buried alive it would not cry?'. His answer: 'In the process of burying if the baby was alive it would cry but not when it fully buried' (QA7677 p 340 NOP). PW19 was also asked: 'It is your answer earlier that when the baby was struggling to breathe underneath the soil the baby would cry to breathe?'. His answer: 'There would be no sound of the cry because it was under the soil' (QA7683 p 340 NOP). PW18 when asked: 'As far as your expertise as a pathologist are you able to form an opinion whether the baby might cry and produce any sound underneath the soil?'. His answer: 'No'.

ANALYSIS OF THE EVIDENCE

[21] My analysis of the evidence is this, that the baby was already dead when he was brought by the two persons to be buried at the burial site. But before I proceed further let me first state my finding who were these two persons that were seen by PW13. From the evidence of PW13 and the DNA report, A1 was the male person, he being identified during the ID Parade. As for the female person, PW13 had not identified her or at all even at the ID Parade. The DNA report, though had shown A2 as well as A1 and the baby profiles to be present, is to be expected because A2 being the mother of the baby had handled the baby from the time she gave birth to him until the baby came to be in the possession of A1 and the female person that were seen by PW13. I am also reminded that in the case where the prosecution had relied only on circumstantial evidence such evidence must irresistibly point to A1 and A2 to the murder of the baby by burying him alive. The principles governing the acceptance of circumstantial evidence to convict an accused have been laid down in numerous cases and the principle gleaned from those cases was that a conviction based on circumstantial evidence was good in law if the cumulative effect of all evidence leads to an irresistible conclusion that it was the accused who committed the crime (see *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195; [1965] 1 LNS 171; *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306; [1982] CLJ 464; [1982] CLJ Rep 130; *Public Prosecutor v Magendran a/l Mohan* [2005] 6 MLJ 6; [2005] 3 CLJ 592; *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307; [1962] 1 LNS 22; *Karam Singh v Public Prosecutor* [1967] 2 MLJ 25; [1967] 1 LNS 65; *Chang Kim Siong v Public Prosecutor* [1968] 1 MLJ 36; [1967] 1 LNS 18).

[22] Now PW19's evidence also supports my finding that the baby was not alive when he was buried. PW19 in his evidence said there was no trace of soil in the baby's nostrils and mouth. PW19 said that if the baby was buried alive, he surely would be struggling for air, there would therefore be traces of soil in the baby's nostrils and mouth. PW19 also said: 'There would be no sound of the cry because it was under the soil.' (QA7683 p 340 NOP).

[23] But it is the evidence of PW13 that the two persons came out from the bushes where the baby was buried tenminutes later. PW13 also said the accused and the one female was about 10–20 minutes in the bushes (QA6205 p 268 NOP). It was also his evidence that the two persons were within the area for two hours until they left the place (QA6250 p 270 NOP). If PW13 heard the baby cries why then the two persons did not also hear the baby cries since they were within the area for two hours. These two persons who had allegedly buried the baby would be very concern indeed and would have gone back quickly to the burial site to check whether it was the baby cries. I therefore cannot accept PW13's evidence on hearing the baby cries which he heard ten minutes later (or much later about 10–20 minutes) after the two persons had allegedly left the burial site. It is impossible for the baby to cry out after ten minutes of being buried. Such evidence is against the evidence of PW19 that: 'There would be no sound of the cry because it was under the soil' (QA7683 p 340 NOP) and also that the baby was only three days old, it may not be able to struggle much (QA7624 p 338 NOP) or that to cry. PW19 also said: 'In the process of burying if the baby was alive it would cry but not when it is fully buried.' (QA7677 p 340 NOP). There were therefore no baby cries that was allegedly heard by PW13, rather it was out of curiosity after seeing the two persons going in and exiting out from the burial site that prompted PW13 to go to the burial site to check wherein he then discovered the baby being buried there.

[24] What then of PW18's evidence on the baby cries allegedly heard by PW13 where he said: 'There is lots of possibility if God willing to show it may happen.' (QA7189 p 323 NOP). I am afraid such remark from the IO of this case does not help the prosecution's case. We are all men of faith but to accede to PW18's answer would be to go against the scientific explanation of PW19 who had done 1000 or more post mortems which have been accepted by the court. We are here to consider the facts and the evidence as adduced by the prosecution, I have to rely on PW19's evidence which support my finding that the baby was in fact already dead when the two persons took the baby for burial at the burial site.

[25] Based on my analysis of the evidence namely that of PW13 and PW19 and having read the submissions of the learned DPP and learned counsel for the accused and upon conducting a maximum evaluation thereof, I find that there exist reasonable doubt in the prosecution's case a prima facie case has not

been established warranting me to call upon the accused to enter their defence. It is my finding from the evidence that the baby was already dead when it was buried. I therefore discharged and acquit the accused on the charge of murder under s 302 of the Penal Code. I however find that the accused may have committed an offence under s 318 of the Penal Code. I therefore direct that the learned DPP to frame a reduced charge against both accused under s 318 of the Penal Code.

Accused discharged and acquitted on charge of murder under s 302 of the Code.

Reported by Mukesh Nair Balakrishnan